IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

CIVILL APPLICATION NO. 3130 OF 2006

ALONGWITH
CIVIL APPLICATION NOS. 1783 & 2283 of 2006
AND

CIVIL APPLICATION NO. 134 OF 2007
IN
WRIT PETITION NO. 8452 OF 2004

The State of Maharashtra and ors .... Petitioner

versus

Vijay Ghogare and others ... Respondents.

Mr. V.A.Gangal Spl. counsel with Mr. P.M. Patil AGP. Mr. Ashok Gade, with Mr. Ulhas Naik and Mr. Chandrakant Yadav for the State of Maharashtra/ applicant.

Mr. Shrihari Aney Sr. Advocate with Mr. Girish Kulkarni, Mr. N.Krishna Prasad i/b. Mr. Anilkumar Joshi for the respondent nos. 1 to 4.

Mr. C.J.Sawant Sr. advocate with Mr. Nitin Dhumal for Akhil Bharatiya Maratha Mahasangh.

Mr. Mahesh Jethmalani with Mr. Gajanan Lasure for H.R.Rathod.

Mr. Rafiq Dada Sr. advocate with Mr. H.V. Vengurkar for Respondent no.11 (in W.P.).

Mr. J.P.Cama Sr. advocate with Mr. Rajesh N. Kachare for Respondent no.9. (R.No.6 in W.P.).

Mr. Sanghjraj D. Rupawate with Dilip Kakade & Aniket Deshkar for Cidco B.C. employees union.

Mr. Ashok N. Kotangale with Mr. Arun D. Nagarjun with Mr. Pravin B. Gaikwad for Respondent no.8.

Mr. Jaisingh Desai for Respondent no.10.

Mr. Raj Amarsingh Gulale for Respondent no.13. (in W.P.)

Mr. M.M.Vaidya for Maharashtra Banjora Samaj
Karmachari & All India Banjora Seva Sangh.

Mr. Mihir Desai for Respondents 9 to 12 (in W.P.).

CORAM; A.P. DESHPANDE, &
V.M. KANADE, JJ.
DATED; 9TH MARCH, 2007

P.C.;

1. This Court by an order dated 22-2-2005 stayed the Government Resolution dated 25th May 2004 which seeks to implement the provisions of the Act in relation to grant of promotions to the reserved category candidates. An application came to be moved seeking modification of the order dated 22-2-2005 and the said application came to be rejected on 20-4-2005. At a later point of time by an order dated 17-8-2006, this court allowed the application for modification and directed that the promotions be made subject to the final order that would be passed in the writ petition. The order dated 17-8-2006 was passed by relying on a Supreme Court order dated 11-11-2002. The orders dated 17-8-2006 and 19-9-3006 came to be challenged by filing Special Leave Petition in Supreme Court and the Supreme Court by an order dated 8-11-2006 directed this Court to denovo consider the applications in the light of the judgment delivered by it in case of **M. Nagraj and others Vs. Union of India and others,**

reported in AIR 2007 S.C. page 71.

2. Interim reliefs prayed for in these writ petitions and the applications for modification/vacation of stay pertain to the promotions of State Government employees. Petitioners have prayed for grant of stay of promotions to the candidates belonging to reserved category whereas the respondent - State Government and some of the interveners urge that the stay be vacated. At this juncture it will not be out of place to mention that in regard to grant of promotions, employees need to be classified in two groups. One comprising of Scheduled Casts and Scheduled Tribes and the other comprise of VJNT and Special backward category. It will not be out of place to state that no reservations are provided in promotions for OBC, in the employment of State of Maharashtra and the Backward class thus comprise of Scheduled Caste, Scheduled Tribe, VJNT and Special backward category. By amending article 16(4A) benefits in the matter of promotions are made available with consequential seniority and the said provision has been held to be intravirus the Constitution and the basic structure. Whereas benefit of Article 16(4A) cannot be extended to VJNT and special backward category candidates.

3. Perusal of the order dated 18-11-2006 passed by the Supreme Court makes it amply clear that this court

may either proceed to pass appropriate orders on interim relief or hear the matters finally nonetheless bearing in mind the ratio laid down in Nagraj's case cited supra. In Nagraj's case the Supreme Court has unequivocally made it clear that Article 16(4A) only applies to Scheduled Casts and Scheduled Tribes and thus it has no application so far as VJNT and special backward category are concerned. No doubt, taking assistance of some of the observations made in Nagraj's case it was tried to be demonstrated by the petitioners that the creamy layer concept is made applicable to Scheduled Caste and Scheduled Tribes. However, the learned counsel appearing for the State Government and the interveners, who represent the group of candidates belonging to the said category, have contended that the said observations in regard to creamy layer being applicable to Scheduled Caste and Scheduled Tribe, which are appearing in the judgment of the Apex Court in Nagraj's case are so made at some places as the Supreme court was dealing with cases, not only in relation to Scheduled Caste and Scheduled Tribes, but also in relation to candidates belonging to OBC category. Reverting back to the situation that is obtained from the record in relation to VJNT and special backward category is concerned, in the light of the judgment in Nagraj's case, three criteria need to be satisfied and the same are (1) backwardness of

the caste, (2) inadequate representation in State service and (3) reservation not existing 50%. Besides satisfying the test laid down in Article 235 of the Constitution of India. The last test of efficiency of administration has already been held by Supreme Court as variable criteria and hence in-depth judicial review therefore is not called for, at any rate at this stage.

4. The State Government has not placed enough material on record to indicate the survey carried out by it, which has a time nexus in relation to the Act in question, to demonstrate as to which of the castes are found to be backward and as to whether the said castes are not adequately represented in State service. The affidavit filed by the State Government itself makes it clear that the committee had carried out scrutiny only in regard to one of the aspect and the same is as to which are the backward castes. The said survey , it appears, was not carried out with a view to examine the criterias as are laid down in Nagraj's case to justify the reservation. It appears that claims put forth by individuals were scrutinised with a view to place them in some of the categories of backward caste. Hence, we have no doubt that enough material has not been placed before this court to conclude in favour of the State that the caste which

are included in VJNT and special backward category are specially, economically and educationally backward and that they are not adequately represented in State service. If this be the position, we find it difficult to vacate the stay to the extent it relate to the grant of promotion to the candidates belonging to VJNT and special backward category. However, as we are primafacie of the opinion that this exercise is not necessarily to be carried out in regard to Scheduled Caste and Scheduled Tribe, their promotions by way of interim order ought not be stayed. We hasten to add that by the present order, we propose to permit the promotions subject to final decision of the writ petition, by way of adhoc arrangement. We vacate the stay to the extent it relates to the Scheduled Caste and Scheduled Tribe as we are primafacie of the view that the criteria of creamy layer does not apply to S.C. and S.T. so also for the reason that review applications, we are informed, are filed and are pending in Supreme Court seeking clarification in that regard in Nagraj's case..

5. Having regard to the break up given by the State Government in the matter of promotion, 67% posts undisputably goes to open category candidates while 13% for S.C. and 7% for S.T. and thus balance of 13% are for VJNT and special backward category. We grant

stay to the promotions of candidates belonging to f VJNT and special backward category for whom 13% of the seats in the promotional cadres are reserved. Needless to mention that all other posts in the promotional cadre including those earmarked for S.C. and S.T. irrespective of creamy layer, would be filled in by the State, ofcourse subject to the final decision of the writ petition.

6. This order which goes to partly vacate the stay is passed having regard to the administrative inconvenience faced by the State on account of operation of stay order for a period of two years. It is emphatically contended by learned counsel MR. Gangal appearing for the State that more than one lakh posts are lying vacant in the promotional cadres and thereby the administration is immensely suffering. It is clarified that the promotions that we have permitted to be made by this order are only in relation to the State Government employees and on similar lines establishments of the instrumentalities of the State, which are covered by Article 12 of the Constitution of India could also be permitted to effect promotion and this order does not apply to other establishments, which are covered by the definition of Establishment in Section 2 of the Act.

To that extent the statusquo shall be maintained.

7. We accordingly permit the state Government to fill up the promotional posts to the extent of 67% from the open category, 13% from Scheduled Caste and 7% from Scheduled Tribe Category. So far as 20% of Scheduled Caste and Scheduled Tribe posts are concerned, the creamy layer concept shall not be made applicable. The balance 13% seats however, shall be kept vacant pending the hearing and final disposal of the writ petition. It is clarified that this arrangement is made subject to the result of the petition. Civil Applications are disposed of the above terms.

8. At this stage the learned counsel for the petitioner in writ petition, prays that the order be stayed for a period of 15 days. Having regard to the administrative inconvenience which the State Government is facing, we reject the prayer.

9. Parties to act on an authenticated copy of this order.

xxx